SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARCY S. FRIEDMAN PART 57

0107324/2003

PETITO, ANTHONY
vs
CITY OF NEW YORK

SEQ 1

SUMMARY JUDGMENT

INDEX NO.

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on this motion to/for Summary Judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION/ORDER.

FILED

JUL 22 2005

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/14/05

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☒ DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

x

ANTHONY PETITO,

Plaintiff(s),

Index No.: 107324/2003

- against -

DECISION/ORDER

CITY OF NEW YORK, BATTERY PARK CITY AUTHORITY, BATTERY PARK CITY PARKS CONSERVANCY CORPORATION, and CASHIN ASSOCIATES, P.C.,

Defendant(s).

x

In this Labor Law action, plaintiff seeks damages for injuries sustained on September 4, 2002, when he slipped and fell off a shipping container at Battery Place in Battery Park City, Manhattan. Defendant City of New York (the "City") moves for summary judgment dismissing the complaint and all cross-claims against it. Defendants Battery Park City Authority ("BPCA"), Battery Park City Parks Conservancy Corporation ("Parks") and Cashin Associates, P.C. ("Cashin") move for summary judgment dismissing plaintiff's Labor Law claims against them.

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party

must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b])." (Zuckerman, 49 NY2d at 562.)

It is undisputed that BPCA hired non-party Metrotech Contracting Corp. ("Metrotech") to replace and widen a sidewalk in Battery Park City. BPCA hired Cashin as construction manager for the project. (Dep. of Peter Sellazzo [BPCA's project manager at the premises] at 14.) Plaintiff was a construction laborer employed by Metrotech. According to plaintiff's uncontroverted testimony, plaintiff was injured while he and a co-worker were using a boom truck with chains to move three shipping containers (P.'s Dep. at 26), each approximately eight to ten feet high. (Id. at 42.) After successfully moving two of the shipping containers, plaintiff was injured while preparing to move the third. He climbed from the boom truck to the top of third shipping container to hook the container to the chain of the boom. (Id. at 40.) There were grooves on the side of the shipping container which plaintiff used to climb to the top. (Id. at 38-39.) While standing on top of the container, plaintiff slipped on standing water and fell off the container to the ground, sustaining injuries. (Id. at 42.) These shipping containers were located within a fenced-in storage area between First and Second Place. (Id. at 13-18.) The shipping containers had to be moved three feet to the east in order for the sidewalk project to proceed. (Id. at 24.) The sidewalk that was to be extended was located outside the storage area, adjacent to the fence, on Battery Park Place. (Id. at 24; Sellazzo Dep. at 27.)

The City's Motion

The City moves for summary judgment dismissing the complaint on the ground, among others, that it did not own the storage area where plaintiff fell, and did not contract for or have any involvement with the sidewalk project. BPCA expressly acknowledges on these motions

that it is the owner of the storage area where plaintiff's accident occurred and of the sidewalk that was to be widened. Plaintiff's contention in opposition that the City may be the owner of the sidewalk is unsupported by any competent evidence and is, in any event, irrelevant, as plaintiff himself testified that his accident occurred in the storage area rather than on the sidewalk. Plaintiff also fails to submit any evidence in opposition to the City's prima facie showing that BPCA entered into a written contract for the sidewalk project, and that the City did not have any involvement with the project. The City's motion for summary judgment dismissing the complaint against it should therefore be granted. BPCA's, Park's and Cashin's Motion

Labor Law § 240(1)

Labor Law § 240 (1) provides:

> All contractors and owners and their agents, * * * in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

"The purpose of the section is to protect workers by placing the 'ultimate responsibility' for worksite safety on the owner and general contractor, instead of the workers themselves." (Gordon v Eastern Ry. Supply, Inc., 82 NY2d 555, 559 [1993]; Rocovich v Consolidated Edison Co., 78 NY2d 509 [1991].) "Thus, section 240(1) imposes absolute liability on owners, contractors and their agents for any breach of the statutory duty which has proximately caused injury." (Gordon, 82 NY2d at 559.)

In moving for summary judgment dismissing plaintiff's Labor Law § 240(1) claim, defendants BPCA, Parks, and Cashin do not argue that the sidewalk widening project was not

construction work within the ambit of that section. Rather, defendants argue that plaintiff's activity at the time of the accident was merely the moving of the shipping containers, and that it therefore did not constitute erecting, altering or any of the other protected activities enumerated in section 240(1). In opposition, plaintiff contends that the moving of the containers was part of the site work for the sidewalk widening project, and was therefore covered by the statute.

Work may be found to be covered by section 240(1) where it does not "fall into a separate phase easily distinguishable from other parts of the larger construction project," does not take place in anticipation of construction or after construction is completed, and is "ongoing and contemporaneous with the other work that formed part of a single contract." (Prats v Port Auth. of New York & New Jersey, 100 NY2d 878, 881 [2003]. See also Beehner v Eckerd Corp., 3 NY3d 751 [2004]. Compare, e.g., Adams v Pfizer, Inc., 293 AD2d 291 [1st Dept 2002], lv denied 99 NY2d 511.)

On this record, the undisputed evidence demonstrates that plaintiff's work was an on-going part of the larger construction project. It is undisputed that plaintiff's employer, Metrotech, was hired by BPCA to widen the existing sidewalk. This contract required Metrotech to demolish the existing sidewalk and install a new sidewalk. (BPCA-Metrotech Contract, Ex.A [Ex. P to City's Motion]; P.'s Dep. at 24.) Defendants themselves acknowledge that the shipping containers had to be moved "as part of" the sidewalk project. (See Sellazzo Dep. at 24.) Plaintiff further testified that while his only work on the date of the accident was to move the containers, he was scheduled, after the containers were moved, "to start chopping up the existing sidewalk." (Id. at 32.) Defendants submit no evidence to the contrary. Under these circumstances, there was not a "bright line separating the enumerated and nonenumerated work."

(See Beehner, 3 NY3d at 752; Martinez v City of New York, 93 NY2d 322 [1999].)

Defendants further argue that plaintiff's accident was not an elevation-related hazard within the protection of section 240(1). While section 240(1) should be construed liberally so as to effectuate its purpose, it is well settled that the statute applies only to "elevation-related hazards." (Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 500 [1993]; Rocovich, 78 NY2d at 514.) The hazards contemplated by the statute "are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured." (Rocovich, 78 NY2d at 514; Narducci v Manhasset Bay Assocs., 96 NY2d 259 [2001].) "The protections of Labor Law § 240(1) are not implicated simply because the injury is caused by the effects of gravity upon an object. * * * [T]his statutory provision 'has historically been construed in the context of workers injured as a result of inadequate or missing safety equipment at elevated work sites.' " (Melo v Consolidated Edison Co., 92 NY2d 909, 911 [1998][internal citations omitted], affg 246 AD2d 459 [1st Dept].)

On this record, the undisputed evidence demonstrates that plaintiff's accident was caused by an elevation-related hazard. Defendants' attorney's contention that plaintiff's work did not require any safety devices (see Harris Aff. In Support, ¶ 13) is without probative value. Moreover, the cases relied on by defendants in which no elevation-related hazard was found where a worker fell from a flat-bed truck are factually dissimilar. (See, e.g., Burgos v Group Mgt., Inc., 271 AD2d 314 [1st Dept 2000]; Dilluvio v City of New York, 264 AD2d 115 [1st Dept 2000].) Here, the undisputed facts are that plaintiff climbed up the shipping container using

grooves on its sides; was not provided with any safety devices; fell eight to ten feet from his work surface on the top of the container; and was engaged in hoisting at the time of the fall.

The court accordingly concludes that the motion of defendants BPCA and Cashin to dismiss the Labor Law § 240(1) claim should be denied. The court reaches a different result as to defendant Parks. It is undisputed that although Parks used the storage area where plaintiff's accident occurred, Parks did not own the storage area and did not contract for the work. Plaintiff accordingly fails to raise a triable issue of fact as to whether Parks is an owner for purposes of section 240(1).

While the court finds that plaintiff was engaged in a protected activity at the time of his accident and that the accident involved an elevation-related hazard, the court declines to grant plaintiff's request that the court search the record and grant summary judgment in his favor. As plaintiff did not move for summary judgment, he did not squarely put defendants on notice of an additional element of his section 240(1) claim – namely, whether the absence of safety devices was a proximate cause of his fall. (See Felker v Corning Inc., 90 NY2d 219 [1997]; Zimmer v Chemung County Performing Arts, Inc., 65 NY2d 513 [1985].) Under these circumstances, this issue must await resolution at trial.

Labor Law 241(6)

Labor Law §241(6) provides:

> All contractors and owners and their agents * * * shall comply with the following requirements:
> 6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places.

It is well settled that this statute requires owners and contractors and their agents " 'to provide reasonable and adequate protection and safety' for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor." (Ross, 81 NY2d at 501-502.) In order to maintain a viable claim under Labor Law §241(6), however, the plaintiff must allege a violation of a provision of the Industrial Code that mandates compliance with "concrete specifications," as opposed to a provision that "establish[es] general safety standards." (Id. at 505.) "The former give rise to a nondelegable duty, while the latter do not." (Id.)

In moving for summary judgment dismissing plaintiff's Labor Law § 241(6) claim, defendants argue that the Industrial Code provisions relied upon by plaintiff either do not impose concrete specifications or are inapplicable to the facts of this action. In opposition, plaintiff relies primarily on Industrial Code § 23-1.7(d) (12 NYCRR) which provides:

> Slipping hazards. Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing.

This section has been held sufficiently specific to serve as a predicate for a section 241(6) claim. (Jennings v Lefcon Partnership, 250 AD2d 388 [1st Dept 1998].) Moreover, there is an issue of fact as to the alleged violation of this provision, as plaintiff claims that he slipped on water on top of the shipping container on which he was working. (See Partridge v Waterloo Cent. School Dist., 12 AD3d 1054 [4th Dept 2004][section applicable to alleged fall on cardboard on counter top on which plaintiff was working] [4th Dept 1998].) Gielow v Rosa Coplon Home (251 AD2d 970 [4th Dept 1998]), the sole case on which defendants rely, is inapposite. There, the section

was held inapplicable to a fall on muddy ground, the court noting that the provision applies to a fall on a foreign substance. In the instant case, in contrast, the water on which plaintiff alleges he slipped was foreign to the container surface on which plaintiff was working.

Plaintiff also seeks to base his section 246(1) claim on Industrial Code sections 23-1.15, 23-5.1 and 23-5.3, which set forth construction requirements for safety railings, scaffolds generally and metal scaffolds, respectively. These Industrial Code sections specify construction requirements for these devices, but do not specify when these devices are required. The sections are therefore applicable only when the devices are provided. (Partridge, 12 AD3d at 1056. See Maldonado v Townsend Ave. Enter., 294 AD2d 207 [1st Dept 2002].) As such devices concededly were not provided to plaintiff, the sections are inapplicable here.

Although plaintiff cites other Industrial Code sections in his bill of particulars, he does not argue their applicability in opposition to defendants' motion for summary judgment, and they are not addressed here. Plaintiff's Labor Law § 241(6) claim must therefore be dismissed, except to the extent based on Industrial Code § 23-1.7(d).

Labor Law § 200 and Common Law Negligence

Labor Law §200 is a codification of the common law duty imposed upon an owner or contractor to provide construction workers with a safe place to work. (See Comes v New York State Elec. and Gas Corp., 82 NY2d 876 [1993].) An implicit precondition to this duty "is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition." (See Russin v Picciano & Son, 54 NY2d 311, 317 [1981].) Thus, "[w]here the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no

liability attaches to the owner under the common law or under Labor Law § 200." (Comes, 82 NY2d at 877. See Ross, 81 NY2d at 505 [same for general contractor].) Neither a "general right to supervise" nor retention of contractual inspection privileges amounts to the control necessary to impose liability under Labor Law §200 or a common law negligence claim. (Brown v New York City Economic Dev. Corp., 234 AD2d 33 [1st Dept 1996]. See Gonzalez v United Parcel Serv., 249 AD2d 210 [1st Dept 1998].) An owner or general contractor thus will not be liable under section 200 where the evidence demonstrates that the plaintiff's employer, and not the owner or general contractor, specifically controlled the methods by which the plaintiff's work was performed. (See Reilly v Newireen Assocs., 303 AD2d 214 [1st Dept 2003], lv denied 100 NY2d 508.) However, supervision and control may be demonstrated by proof that the owner or general contractor had responsibility for coordinating the work of the subcontractors to avoid unsafe working conditions (see, e.g., Rizzuto v L.A. Wenger Contr. Co., 91 NY2d 343 [1998]; Badagliacca v Lehrer McGovern Bovis, Inc., 267 AD2d 16 [1st Dept 1999]), had control over safety practices at the work site (see, e.g., Ross, 81 NY2d at 495; Boss v Integral Constr. Corp., 249 AD2d 214 [1st Dept 1998]) or inspected the work on a daily basis and had the authority to stop the performance of, and to order correction of, unsafe work practices. (See, e.g., Freitas v New York City Tr. Auth., 249 AD2d 184 [1st Dept 1998]; Gawel v Consol.Edison Co. of New York., Inc., 237 AD2d 138 [1st Dept 1997].)

Applying these principles to the instant case, the court finds that defendant Cashin fails to eliminate triable issues of fact as to whether it exercised sufficient control and supervision over plaintiff's work to render it liable under section 200. Cashin's senior construction inspector on the project, Thomas Calo, testified that his responsibility at the site included monitoring the

contractor's work with respect to the contract plans and specifications (Calo Dep. at 7), and that he was on the site on a daily basis. (Id.) He further testified that he was responsible to make sure that the shipping containers were moved, but not how they were moved. (Id. at 32, 40.) Cashin's Vice President, James Gladysz, testified, however, that Mr. Calo was authorized to inspect the work in progress, and that he had authority to stop the work if he saw a dangerous condition. (Gladys Dep. at 27-30.) Mr. Calo acknowledged that he saw the boom truck being maneuvered on the day of plaintiff's accident, although he did not recall whether he saw workers on top of the shipping containers. (Calo Dep. at 32-33.) Plaintiff testified that he received his instructions as to his duties that day from Mr. Calo and his Metrotech Supervisor, Louis Visconti (see P.'s Dep. at 19), and that he received instructions from Cashin approximately 80% of the time as to what his job duties were. (Id. at 20.)

This is not a case in which the record demonstrates that the methods of plaintiff's work were determined exclusively by plaintiff's employer. (Compare Reilly v Newireen Assocs., 303 AD2d 214, supra.) Rather, the record raises a triable issue of fact as to whether Cashin exercised the degree of supervision and control necessary to support liability under section 200.

As to BPCA, Peter Sellazzo, BPCA's project manager, testified that his responsibilities were to "oversee the project and make sure the project came in within budget and on schedule." (Sellazzo Dep. at 12-13.) He further testified that he was on site at various times to "inspect to see how the daily work [was] going, talk to the CM [Cashin] to make sure everything [was] on schedule." (Id. at 18.) Mr. Sellazzo testified that BPCA would leave it up to Cashin to determine how the shipping containers were going to be moved. (Id. at 39.) Finally, he testified that if he saw a dangerous condition with respect to worker safety, he would "speak to the project

manager of the job and let them know." (Id. at 88.) Plaintiff testified that he was not supervised by anyone from BPCA. (See P.'s Dep. at 76.)

On this record, plaintiff fails to raise a triable issue of fact as to BPCA's liability under section 200. There is no evidence to demonstrate that BPCA controlled the methods of plaintiff's work, managed safety at the site, or otherwise directed Metrotech's employees in connection with their tasks. Accordingly, plaintiff's claim under Labor Law § 200 and common law negligence against BPCA must be dismissed.

Defendant Parks' motion to dismiss the section 200 claim is unopposed by plaintiff and will therefore also be dismissed.

Accordingly, it is hereby ORDERED that defendant City's motion for summary judgment is granted to the extent of dismissing the complaint and all cross-claims against it, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that motion of defendants BPCA, Parks and Cashin is granted to the following extent: The complaint and all cross-claims against defendant Parks are dismissed, and the Clerk is directed to enter judgment accordingly; and plaintiff's Labor Law § 200 and common-law negligence claims are dismissed as against BPCA; and plaintiff's Labor Law § 241(6) claim is dismissed except to the extent based on Industrial Code § 23-1.7(d); and the motion is otherwise denied; and it is further

ORDERED that the remaining claims are severed and shall continue

This constitutes the decision and order of the court.

Dated: New York, New York
July 14, 2005

MARCY FRIEDMAN, J.S.C.